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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Amendment of the Commission's Rules Regarding the
37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket
No. 95-183, RM-8553

Implementation of Section 309(j) of the
Communications Act -- Competitive Bidding, 37.0-
38.6 GHz and 38.6-40.0 GHz, PP Docket No. 93-253

Dear Ms. Salas:

On behalf of Winstar Communications, Inc.,
enclosed for filing are an original and eleven copies of
Winstar's Petition for Clarification/Reconsideration of the
Commission's Report and Order in the above referenced rule
making proceeding.

Should you have any questions regarding this
filing, please contact the undersigned.

Sincerely,



Michael F. Finn

Enclosures

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

MAR - 9 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of the Commission's)
Rules Regarding the 37.0-38.6 GHz)
and 38.6-40.0 GHz Bands)

ET Docket No. 95-183
RM-8553

Implementation of Section 309(j) of)
the Communications Act -- Competitive)
Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz)

PP Docket No. 93-253

**PETITION FOR CLARIFICATION/RECONSIDERATION OF
WINSTAR COMMUNICATIONS, INC.**

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby files this Petition for Clarification/Reconsideration of the above-captioned Commission Order.¹ As discussed below, clarification or modification is required with respect to the rules governing partitioning and disaggregation of spectrum and those governing inter-licensee interference.

I. PARTITIONING AND DISAGGREGATION RULES.

Several parts of the partitioning and disaggregation rules adopted pursuant to the 39 GHz Order are subject to interpretations that are at odds with the Order's plain language. Consequently, clarification is needed to ensure that the

¹ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997) ("39 GHz Order").

Commission's decisions in the 39 GHz Order are reflected accurately in the rules. Specifically, the Commission must make clear that: (1) incumbent 39 GHz licensees such as WinStar may partition and disaggregate their non-BTA 39 GHz licenses; (2) 39 GHz licensees including incumbents may enter into agreements combining partitioning and disaggregation; and (3) 39 GHz licensees taking advantage of bidding credits may partition and disaggregate subject to the unjust enrichment provisions to be adopted pursuant to the Second Notice of Proposed Rule Making.

WinStar also believes that the Commission should grant all 39 GHz licensees the flexibility to partition along any licensee-defined service area rather than the more restrictive geopolitical boundaries required by Rule 101.56.

A. Incumbent 39 GHz Licensees Must Be Permitted To Partition Their Non-BTA 39 GHz Licenses.

In the 39 GHz Order, the Commission held that partitioning "should be permitted in the 39 GHz band" and that "the option of partitioning . . . should be made available to all entities eligible to be licensees in the 39 GHz band, including incumbent 39 GHz licensees."² The Commission premised its conclusion on the fact that partitioning "will promote competition in the 39

² See id. at 18635, ¶ 71 (emphasis added). Further support for an incumbent's right to partition is the fact that partitionees of "rectangular service area[s]" who fail to meet the Commission's construction requirements will forfeit their license to the BTA holder and not the original rectangular service area partitioner, i.e., the incumbent 39 GHz licensee. See id. at 18636, ¶ 74 (emphasis added).

GHz service" and help eliminate market entry barriers.³ Although the Order appropriately grants partitioning authority to all licensees, the rule permitting such actions is less clear, stating that the "holder of a BTA authorization to provide service in the 38.6-40.0 GHz band pursuant to the competitive bidding process may enter into agreements with eligible parties to partition any portion of its service area . . ."⁴ The rule, therefore, seems inconsistent with the language of the Order and with Commission precedent which grants incumbent licensees authority to partition their licenses.⁵ Thus, the Commission should clarify Rule 101.56 to make clear that incumbents in the 39 GHz band are permitted to partition their licenses.⁶

³ See *id.* at 18635, ¶ 73. A similar conclusion was reached with respect to disaggregation. See *id.*

⁴ See 47 C.F.R. § 101.56(a)(1).

⁵ See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order, 12 FCC Rcd 19079, at 19134, ¶ 156 (1997) ("SMR Order") ("We adopt our tentative conclusion and further extend partitioning to all incumbent licensees and eligible SMR licensees on all SMR channel blocks."); Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, at 21833, ¶ 1 (1996) ("Broadband PCS Order") (adopting flexible rules that "permit partitioning and disaggregation by all broadband PCS licensees") (emphasis added).

⁶ The Commission should not treat 39 GHz incumbent licensees differently than BTA auction winners with respect to partitioning and disaggregation. See Adams Telcom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir. 1994) ("We have recently reminded the FCC of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment."). See also Freeman Eng'g Assoc. v. FCC, 103 F.3d 169, 178 (D.C. Cir. 1997) (same). In light of the above, there is also little reason

B. All 39 GHz Licensees May Enter Into Combined Partitioning And Disaggregation Agreements.

In accordance with its flexible use policies, the Commission should clarify that 39 GHz licensees may enter into combined partitioning and disaggregation agreements.⁷ As an initial matter, the ability to partition and/or disaggregate was designed to "enhance 39 GHz licensees' flexibility with respect to system design and service offerings, . . . facilitat[e] the development of niche markets and the arrival of new entrants . . . [and] promote efficient use of 39 GHz spectrum."⁸ The ability to jointly partition and disaggregate would further advance such flexibility. Indeed, such combinations have been permitted in other bands in order to grant parties greater flexibility in designing agreements.⁹ As the Commission has held, "by allowing such combined partitioning and disaggregation, we believe that the goals of providing competitive service offerings, encouraging

for the Commission to withhold disaggregation authority from incumbent 39 GHz licensees. Such authority has been granted to incumbent licensees in other services. See SMR Order, 12 FCC Rcd at 19139, ¶ 174 ("We conclude that all SMR licensees should be allowed to disaggregate portions of their spectrum to any party that is qualified for the spectrum's underlying channel block.") (emphasis added). See also Broadband PCS Order, 11 FCC Rcd at 21833, ¶ 1 (same).

⁷ The Order does not discuss this point.

⁸ See 39 GHz Order, 12 FCC Rcd at 18635, ¶ 71.

⁹ See SMR Order, 12 FCC Rcd at 19150, ¶ 217 ("[A]llowing entities to propose combined partitioning and disaggregation transactions would provide added flexibility and would facilitate such arrangements."); Broadband PCS Order, 11 FCC Rcd at 21866, ¶ 66 ("To allow parties flexibility to design the types of agreements they desire, we will permit combined partitioning and disaggregation.").

new market entrants, and ensuring quality service to the public will be advanced."¹⁰ The same rationale applies here.¹¹

C. Licenses Utilizing Bidding Credits In The 39 GHz Auction Should Be Permitted To Partition And Disaggregate Subject To The Unjust Enrichment Rules.

The 39 GHz Order states that 39 GHz licensees taking advantage of bidding credits and seeking to utilize partitioning and disaggregation procedures may do so subject to the unjust enrichment provisions to be established pursuant to the Second Notice of Proposed Rule Making.¹² The rule adopted pursuant to the Order forbids entirely a licensee that has used bidding credits from partitioning or disaggregating its license.¹³ Aside from the fact that the rule conflicts with the Order, the Commission has permitted licensees utilizing bidding credits in other bands to partition or disaggregate subject to unjust

¹⁰ See Broadband PCS Order, 11 FCC Rcd at 21866, ¶ 66. See also SMR Order, 12 FCC Rcd at 19150, ¶ 217 (same).

¹¹ As discussed in note 6, supra, disaggregation authority should be given to incumbent licensees. Thus, incumbents also should be granted the ability to combine partitioning and disaggregation.

¹² See 39 GHz Order, 12 FCC Rcd at 18635, ¶ 73 ("[A]ny 39 GHz BTA licensees taking advantage of bidding credits and seeking to utilize these options may be subject to the restrictions on assignments or transfer of control for such entities."). The Second Notice of Proposed Rule Making portion of the Order sought comment on rules to implement this policy. See id. at 18669, ¶ 170.

¹³ See 47 C.F.R. § 101.56(i) ("Licensees, except those using bidding credits in a competitive bidding procedure, shall have the authority to partition service areas or disaggregate spectrum.") (emphasis added).

enrichment provisions¹⁴ and has adopted a similar rule as part of the general competitive bidding rules for all services licensed by auction.¹⁵ WinStar therefore asks the Commission to clarify that 39 GHz licensees which utilize bidding credits may partition or disaggregate their spectrum subject to the unjust enrichment provisions.¹⁶

D. Partitioning Should Not Be Limited To Geopolitical Subdivision Boundaries.

The 39 GHz Order requires partitioning to occur "according to county boundaries, or according to other geopolitical subdivision boundaries."¹⁷ That rule is unduly restrictive and will diminish the utility of licensees' partitioning abilities.

The Commission previously has held that providing licensees with the flexibility to determine partitioned areas "will permit the market to decide the most suitable service areas."¹⁸ In so doing, the Commission expressly recognized that arbitrarily restricting partitioning to geopolitical boundaries "may not be reflective of market realities and may otherwise inhibit

¹⁴ See SMR Order, 12 FCC Rcd at 19148, ¶ 210; Broadband PCS Order, 11 FCC Rcd at 21852, ¶ 34 and 21862, ¶ 55.

¹⁵ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 97-413, WT Docket No. 97-82, at ¶ 57 (rel. Dec. 31, 1997).

¹⁶ The 39 GHz band should not be treated differently than other spectrum bands. See supra note 6.

¹⁷ See 47 C.F.R. § 101.56(a)(1).

¹⁸ See Broadband PCS Order, 11 FCC Rcd at 21847, ¶ 24.

partitioning."¹⁹ For those reasons, the Commission concluded that granting licensees the ability to define their own partitioned areas was preferable to agency-imposed limitations "as long as the parties submit information in their partial assignment applications that describes the partitioned license area."²⁰ That would seem simple to accomplish here especially given that the 39 GHz rules require parties to define their partitioned service areas "by coordinate points at every 3 seconds along the partitioned service area unless an FCC recognized service area is utilized . . . or county lines are followed."²¹ Given the above, the Commission should revise its partitioning rules to permit 39 GHz licensees to define their own boundaries for partitioning their licenses.

II. THE INTER-LICENSEE INTERFERENCE RULES SHOULD BE INTERIM IN NATURE.

In the 39 GHz Order, the Commission stated that its interference rules would be "interim" measures pending final action on the National Spectrum Management Association's ("NSMA") recommendations for adopting procedures that will minimize interference in the 39 GHz band.²² WinStar believes that the Commission's rules requiring parties to (1) coordinate within 16

¹⁹ Id. at 21847, ¶ 23.

²⁰ See SMR Order, 12 FCC Rcd at 19137, ¶ 165; Broadband PCS Order, 11 FCC Rcd at 21847, ¶ 24.

²¹ 47 C.F.R. § 101.56(a)(2)(ii).

²² See 39 GHz Order, 12 FCC Rcd at 18633, ¶ 68.

kilometers of BTA boundaries and (2) respond to coordination notifications within 10 days should be considered interim measures pending both NSMA's issuance of interference procedures and licensee experience with interference issues relating to large scale point-to-multipoint system deployment.²³ As the Commission has recognized, "NSMA continues to evaluate means to control inter-licensee interference";²⁴ such NSMA-created measures should form the predicate of the Commission's future rulemaking on interference criteria.²⁵

²³ Because the Commission's point-to-multipoint rules for the 38.6-40.0 GHz band do not become effective until April 7, 1998, licensees have had little opportunity to ascertain appropriate border interference standards.

²⁴ 39 GHz Order, 12 FCC Rcd at 18633, ¶ 68.

²⁵ Id. ("[W]e will also be exploring [the inter-licensee interference] issue in a future, separate proceeding.").

III. CONCLUSION.

For the foregoing reasons, WinStar respectfully urges the Commission to clarify and/or reconsider its partitioning and disaggregation rules as well as its rules involving inter-licensee interference.

Respectfully submitted,

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